Request to Extend Partial Adapted Implementation for USEITI Subnational Revenues

Requirements 4.6 and 5.2(a) of the 2016 EITI Standard requires Implementing Countries to report on sub- national revenues from oil, gas, and mining in two ways: Requirement 4.6 requires reporting on revenues received directly by sub-national governments from companies working in the extractives sector; separately, requirement 5.2(a) requires reporting on revenues transferred from national governments to sub- national governments.

In seeking initial approval for partial adapted implementation of these requirements, the USEITI Candidacy Application described the U.S. approach for sub-national transfers and payments, which fully complies with Requirement 5.2(a) and partially complies with Requirement 4.6.

The initial USEITI partial adapted implementation request provided detailed support demonstrating the "significant practical barriers" to satisfying Requirement 4.6 across the many States with significant extractive industry revenues, separate laws and tax regimes, and a combination of State and private mineral ownership. Similarly, because U.S. law recognizes tribes as sovereign nations, the MSG does not believe Tribes are subnational governments as defined by the EITI Standard. However, the MSG continues to have discussions with several tribal governments about voluntary participation in USEITI. We incorporate here by reference the entirety of our previous submission in this regard. (See USEITI Candidacy Application at page 28).

In March 2014, the EITI Board approved the US request for partial adapted implementation, thereby finding the reasons set forth in the initial request to satisfy the "significant practical barriers" standard. Given the constitutional, legal, and structural nature of those barriers, they still exist and are expected to permanently persist. Accordingly, and for the reasons previously explained and incorporated herein by reference, the USEITI requests that partial adapted implementation be extended for a portion of Requirement 4.6.

As part of the approach to subnational reporting described in our initial implementation request and subsequently approved by the Board, we described an alternative process for including subnational revenues. Below we provide the Board an update on the significant progress made to implement that process and modifications based on lessons learned.

I. Relevant EITI Requirements

The USEITI MSG seeks an extension of partial adapted implementation for the bolded portions of the requirements below.[1]

A. Requirement 4.6 Subnational payments:
   It is required that the multi-stakeholder group establish whether direct payments, within the scope of the agreed benefit streams, from companies to subnational government entities are material. **Where material, the multi-stakeholder group is required to ensure that company payments to subnational government entities and the receipt of these payments are disclosed and reconciled in the EITI Report.** [Emphasis added]

[1] These passages are materially the same as Requirements 4.2(d) and 4.2(e) of the 2013 EITI Standard, under which the MSG originally requested partial adapted implementation in the December 2013 USEITI Candidacy Application.

B. Requirement 5.2(a) Subnational transfers:
Where transfers between national and subnational government entities are related to revenues generated by the extractive industries and are mandated by a national constitution, statute or other revenue sharing mechanism, the multi-stakeholder group is required to ensure that material transfers are disclosed. Implementing countries should disclose the revenue sharing formula, if any, as well as any discrepancies between the transfer amount calculated in accordance with the relevant revenue sharing formula and the actual amount that was transferred between the central government and each relevant subnational entity. The multi-stakeholder group is encouraged to reconcile these transfers. **Where there are constitutional or significant practical barriers to the participation of subnational government entities, the multi-stakeholder group may seek adapted implementation in accordance with Requirement 8.1.** [Emphasis added]

With regards to the first sentence of Requirement 5.2(a), the U.S. Department of the Interior fulfills this call for data through its unilateral disclosure of federal revenue disbursements to subnational governments. The Department of the Interior publishes this data disaggregated down to a county level where available on the USEITI website.

II. State Data Collection Update

As the MSG wrote in the 2013 USEITI Candidacy Application, the U.S. Constitution reserves certain powers for state governments, as opposed to the federal government:

> *States maintain ownership of some lands and minerals; develop their own taxation and royalty systems applicable to oil, gas, and mining; and collect extractive revenues directly. Each state has a unique revenue-collection regime. In many cases, revenue collections include royalties on minerals produced from state lands and severance taxes on the value of all minerals extracted in a state.*[2]

Given the significant practical barriers to collecting data from all 50 states and the District of Columbia, the MSG identified 18 priority states with significant oil, gas, or mineral production, each of which collected $50 million or more in extractive industries revenues.[3] As a first step, the MSG collected and published currently available state data, first in 2015, with an extensive update in 2016:

A. The first USEITI report, published in December 2015, includes an overview of natural resource regulation, production, and revenue in these 18 states. A summary of this information is available in the executive summary of the report[4], while more detailed information, including links to relevant state government websites that may house more data, is available on the USEITI website.[5]

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[2] *USEITI Candidacy Application*, p. 29: doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI-MSG-Approved-Application_12-12-13.pdf
[3] *USEITI Candidacy Application*, p. 29
[4] *USEITI 2015 Executive Summary*, p. 56: useiti.doi.gov/downloads/USEITI_executive-summary_2015-12-22.pdf
[5] *How It Works: Regulations in 18 States*: useiti.doi.gov/how-it-works/state-legal-fiscal-info

B. The USEITI website was updated in October 2016 to include profiles on all 50 states, the District of Columbia, and offshore regions where natural resource extraction takes place. Each profile includes state or region-specific data on production, federal revenue, state revenue (where it's available), GDP, employment, and exports. The profiles also provide users with links to state agencies that govern extraction, as well as to the text of relevant state laws.

III. State Opt-In Update

The MSG has done extensive outreach to state governments, as well as to local civil society and industry stakeholders, in order to garner state-level participation or "opt-in" to USEITI.

In 2013, the MSG held five public meetings throughout the country in priority states and one public webinar that people across the country could access. The MSG also gave presentations to three civil society or industry groups: the Alaska Federation of Natives, the State and Tribal Royalty Audit Committee, and the Council of Petroleum Accountants Societies.[6] The MSG continued its outreach in October 2014 by sending letters to the offices of the governors of the 18 priority states, encouraging state participation in USEITI.[7] Individual MSG members fostered relationships with some of those governors' offices, and the USEITI State and Tribal Opt-In Subcommittee spoke directly with officials and staff from state revenue and natural resource offices as part of its outreach.

In its 2014 Annual Activity Report, the MSG proposed a three-tiered approach to securing state opt-in to USEITI:[8]

1. *The MSG will establish a point of contact in the subnational government*

2. *A member of the subnational government will be formally nominated to the USEITI MSG, and*

3. *The subnational government will undertake enhanced opt-in.*

Since collaborating extensively with states, the MSG's vision of the opt-in process has evolved to allow greater flexibility for states, given the diverse government structures of each. The MSG will continue to establish a point of contact with subnational governments as a first step. Additionally, the MSG will continue to work with states on an "enhanced opt-in" commitment, wherein states provide data to be integrated into the USEITI report and website. However, the MSG has concluded that it would be impractical to nominate a member of all 18 priority state governments to the USEITI MSG.

So far, three states have opted in to USEITI to differing degrees: Montana, Wyoming, and Alaska.

A. **Montana:** The director of the Montana Department of Revenue sent a letter to the U.S. Department of the Interior in July 2015, confirming that the state intended to opt in to USEITI.

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[6] *Public Outreach on the U.S. Draft EITI Candidacy Application*, p.2: doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/USEITI-Public-Outreach-Summary-Presentation.pdf

[7] *USEITI Communications Plan, Ver. 15*, p. 13: doi.gov/sites/doi.gov/files/migrated/eiti/FACA/upload/CommunicationsPlanVer15.pdf

[8] *United States EITI Annual Activity Report 2014,* p. 41-42: https://www.doi.gov/sites/doi.opengov.ibmcloud.com/files/uploads/Annual%20Activity%20Report%202014%207_17_15%20Final.%20%281%29%20%281%29.pdf

Since then, members of the MSG and the USEITI Independent Administrator have worked closely with officials and employees from the Montana government to shape Montana's profile page on the USEITI website. While the MSG provided a suggested data template for state opt-in, the data that will appear on the website is ultimately the state's decision. The page will include:

1. Production data for the entire state, for federal land, and for state land
2. Extractive revenues to the federal government and to the state government, broken down by types of revenue
3. Data on tax expenditures, which are policy instruments that reduce state revenue through changes to the tax code
4. Economic data on GDP, wage and salary jobs, self-employment, and exports
5. Data showing how both federal and state extractive revenues are disbursed to various funds
6. An explanation and links to state agencies and state laws and regulations that are relevant to extraction
7. Data on four types of fiscal costs – related to transportation, water, emergency services, and reclamation – of extraction to local communities.

B. **Wyoming:** The governor of Wyoming indicated the state's commitment to USEITI on September 27, 2013 when it appointed Mike Matthews of the Wyoming Department of Audit to the MSG. The USEITI Independent Administration has worked closely with him and with other officials and employees from the Wyoming government to shape Wyoming's profile page on the USEITI website. As is the case with Montana and all opt-in states, the data that will appear on the website is ultimately the state's decision. The page will include data and information similar to what is listed above for Montana.

C. **Alaska:** The USEITI Independent Administrator has worked closely with the state of Alaska to craft a state profile similar to those of Montana and Wyoming. State and Tribal Opt-In Subcommittee member and civil society organization representative Veronica Slajer has met numerous times with the Alaska governor's staff and received confirmation from the deputy chief of staff that the state is committed to opting in to USEITI. The Subcommittee expects to soon receive an official letter from the governor confirming the state's intent to opt in to USEITI.

III. Tribal Government Opt-In

As stated above, because the U.S. federal government recognizes tribes as sovereign, the MSG believes that the EITI Requirements for subnational reporting do not apply to tribes located within the boundaries of the United States. However, the MSG has provided the option to tribal governments to voluntary opt in to USEITI reporting and has been conducting outreach to tribes for that purpose.

A. Tribal Sovereignty

The U.S. federal government's relationship to tribes differs significantly from its relationship to states. Unlike states, which retain *some* powers of self-governance but ultimately make up a federation, tribes are sovereign nations. The U.S. federal government officially recognizes 567 tribes, with which it maintains government-to-government relationships much like it maintains relationships with foreign countries.

As explained in the first USEITI report, tribal sovereignty was established by the Commerce Clause of the U.S. Constitution (Article 1, Section 8, Clause 3) and has been upheld by a number of Supreme Court decisions.[9] Tribes in the United States govern themselves – through a variety of government systems chosen by the tribes. Tribes also have land tenure. Many tribes own land – millions of acres in some cases - and the mineral estate appurtenant to the land. These two tenets of tribal jurisprudence in the United States mean that the tribes make their own decisions about whether to lease their lands for extractive purposes, and that the tribes own the minerals that are leased and the revenue that is generated from any production on Tribal land.

Tribes have jurisdiction over the lands they own. They enact their own laws, pursue their own economic development interests, decide who is eligible for membership in the tribe, and preserve their own cultures, each as they see fit.

The Federal government does, through the Office of Natural Resources Revenue, collect the majority of the extractive industry revenue generated on tribal lands. The Federal government does not own that revenue, however, as is the case with revenue generated from Federal lands. The Federal government merely holds the revenue until it can be distributed to the Tribal Nation that owns the mineral interest from which the revenue was generated. The United States distributes 100 percent of the tribal revenue that it collects back to the tribe that owns the mineral that was extracted. In this regard, the United States serves as a trustee for the tribe, ensuring that the tribe receives every dollar that it is owed from the companies conducting the extractive activities on tribal land.

The trustee relationship also prohibits the United States from unilaterally disclosing most information about Tribal mineral production or revenue without a tribe's express permission. ONRR currently publishes, each year, a press release that describes the aggregate revenue produced from tribal land on a national basis. ONRR is prohibited, however, by its trust responsibility to the tribes, from disclosing that same information on a tribe-by-tribe or even state-by-state basis. There is no legal authority in the United States by which the Federal government can compel tribes to disclose their extractive revenue or production to the public. In fact, the legal authority is overwhelmingly designed to reach the opposite conclusion – protection of tribal data from release.

B. Energy and Mineral Tribes

ONRR collects extractive revenue for approximately 35 tribes in the United States. The range of operations differs widely among these tribes. In the oil and gas field, some tribes merely lease tribal land to a producer, who operates the wells, and pays ONRR, which disburses the revenues back to the tribes through the Office of the Special Trustee for American Indians. Some tribes have started their own oil and gas production companies, which operate on their own reservations, but also function off of the reservation like a private sector operator. Other tribes have particular legal regimes that apply only to them and that guide oil and gas production on lands under their jurisdiction. Three tribes, the Navajo, the Hopi, and the Crow, produce coal.

C. MSG Progress on Tribal Opt-In

Despite the legal regime described above, the MSG has conducted ongoing outreach with tribal governments. For example, three tribes have employees serving as members of the MSG:

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[9] *USEITI 2015 Executive Summary*, p. 70

1. **Shoshone and Arapaho Tribes:** Claire Ware, director of the Shoshone and Arapaho Tribes Minerals Compliance Office, joined the MSG on January 13, 2015, and has been an active participant in the State and Tribal Opt-In Subcommittee.

2. **Blackfeet Tribe:** Julie Lenoir, Audit Manager/PI of the Blackfeet Nation Oil and Gas Royalty Audit, joined the MSG on December 15, 2015, and has been an active participant in the State and Tribal Opt-In Subcommittee.

3. **Choctaw Nation:** Bruce Barnett, the Executive Director of Finance of the Choctaw Nation, joined the MSG as an alternate member on December 15, 2015.

The MSG also identified eight tribes that may be interested in opting-in to USEITI. In 2016, the MSG had initial discussions with three of these tribes. Two tribes, the Blackfeet Nation and the Osage Nation, have expressed interest in further discussions, and those discussions are continuing. In 2017, the MSG plans to add additional information to the contextual narrative portion of its report, explaining in more detail how the extractive industries work in the context of tribal nations.